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MUSEUMS CAN DO BETTER: ACQUISITIONS POLICIES CONCERNING STOLEN AND ILLEGALLY EXPORTED ART

LINDA F. PINKERTON*

INTRODUCTION

If the art market is going to be cleaned up, that is to say freed of so much stolen and smuggled artwork,¹ art museums in the United States are going to have to abandon the back seat and take a leading role in the cleaning. The dialogue and the rhetoric have not changed for decades, but the pace of litigation in the United States has increased.² This is the ugly consequence of generations of experts who merely pay lip service to the need to solve the problem. This article reviews the acquisitions policies of art museums in the United States and suggests a change.

All participants in this problem are by now well entrenched in their excuses. Buyers claim that the problem is lax protections, if

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1. The articles and reports of enormous numbers of stolen and smuggled artworks in the art market are too numerous and too frequent to cite. See, e.g., Carol Vogel's recent article in the *New York Times* about artworks smuggled out of Asia, one of which turned up at no less an institution than the Metropolitan Museum of Art in New York City. Carol Vogel, *Tracing Path of Artworks Smuggled out of Asia*, N.Y. TIMES Apr. 23, 1997, at C9. See also . . . and the shame of the trade . . . And 100 Looted Masterpieces, ART NEWSPAPER, Mar. 1997, at 15; Regina Krah, *Major Theft from Brussels*, ART NEWSPAPER, Mar. 1997, at 1. For a remarkably candid look at the thieves themselves who commit these crimes, see William M. Carley, *Easel Pickings: For This Art Collector, Priceless Paintings are Get-Out-of Jail Cards*, WALL ST. J., Sept. 29, 1997, at 1.

2. Recent United States cases involving foreign claimants for objects include *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y. 1990) (ultimately settled); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg, & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990), and *Republic of Lebanon v. Sotheby's*, 561 N.Y.S.2d 566 (N.Y. App. Div. 1990). Consider also the recent case involving the purchase in 1965 by the Wadsworth Athenaeum in Hartford, Connecticut of a famous painting by Jacopo Zucchi that disappeared from the Italian Embassy in Berlin in 1945. Now that the Italian government has located the painting, the museum is negotiating its return. See ART NEWSPAPER, Feb. 1997, at 7.

any, at the source.³ The source countries⁴ complain of bribes and dishonesty throughout the market. The auction houses generally claim that they handle such an enormous volume of objects that they cannot possibly trace the provenance of each piece. They remind the world regularly that they do not own what they sell; that they simply handle objects for the sellers, who therefore feel little if any pressure to surrender the real history of the piece.⁵ If the title fails⁶ or the piece is fake, the auction house will unwind the transaction. Art dealers lack sufficient motivation to learn the true provenance of each object they sell. As long as there is a buyer for an object, the less a dealer knows about its past the better, lest he have to disclose an unsavory past and possibly commit a crime himself.⁷

For ages, it seems, the champions of theft victims have been arguing for a simple halt in the market for stolen and smuggled goods, without any significant means of encouraging the market to stop itself.⁸ Victims continue to hunt for more sticks rather than carrots.⁹ And, as time passes, each object gathers more and more

3. For the most articulate presentations of the concerns of buyers in the art market, see the many writings of John Henry Merryman. See, e.g., John Henry Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477 (1988). See also John Henry Merryman, *Is there a legitimate role for an international market in antiquities*, ART NEWSPAPER, Nov. 1995, at 22; John Henry Merryman, *Collection withdrawn from Swiss museums in protest against Unidroit*, ART NEWSPAPER, Sept. 1997, at 13.

4. Source countries are sometimes referred to as art-rich countries. These are the nations rich in art which the rest of the world collects.

5. Interestingly, in all forms, contracts are correspondence, the auction houses refer to a piece they are selling as "property" whereas a museum or a dealer will refer to the same piece as an "object." The subtlety of the difference is telling. The auction houses are simply moving goods through their conduit, regardless of their size, shape, value, importance or past. For an interesting discussion of the issues related to regulating auction houses, see Patty Gerstenblith, *Picture Imperfect: Attempted Regulation of the Art Market*, 29 WM. & MARY L. REV. 501 (1988).

6. In other words, if it turns out that the seller did not have clear title to the piece because, for example, it did not in fact belong to the seller, because it was stolen, or because of liens, the auction house will refund the buyer's money. In New York, the auction house is required to do this by Rules of the City of New York. See Auctioneer's Licenses, 6 R.C.N.Y. 2-124(a) (Dep't of Consumer Affairs 1997). Auctioneers in New York are carefully regulated by both the City of New York and the State of New York. See Auctioneer's Licenses, 6 R.C.N.Y. 2-121 to 125; N.Y. Gen. Bus. Laws 21, 25-28 (Consol. 1997).

7. An object with a pristine provenance will always fetch a higher price, but that necessitates knowing the provenance at all. A dealer concealing material information about the object could be found guilty of fraud, transporting stolen property or a host of other crimes depending upon the facts of the situation.

8. The great champion of theft victims is, of course, UNESCO. The second greatest champion of theft victims is the collection of officials from the ministries of culture of the source countries. See *Letter from a Source Country — or Wonderland*, ART NEWSPAPER, Nov. 1995, at 23.

9. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT

moss on itself as it rolls through the world marketplace. The higher the prices go, the greater the incentive for thieves and smugglers.

Goods made to circulate in trade continue to do so for millennia. They do not suddenly appear in a box marked "STOLEN" or "SMUGGLED" and drop to the market floor forever. Ordinary buyers, with the exception of sophisticated art collectors, lack the means to determine whether artifacts are or are likely to be stolen or smuggled. The law these days imposes a series of duties on the buyer, after the fact of course because no one knows exactly what standards a court will use to evaluate his or her diligence when, years later, the buyer finds him or herself a defendant in a recovery suit.¹⁰ There is no certain way to determine, in all cases without fail, whether an artwork is stolen or smuggled. The law requires merely that the buyer do the requisite checking, but not necessarily learn the truth. If the buyer learns that the piece is stolen or smuggled, he or she probably would decline the purchase, but most buyers do not check and very few can afford to check thoroughly unless the object is expensive and the buyer is wealthy.

Art museums, however, are sophisticated art collectors, responsible for and capable of the utmost diligence. Art museums, most of which are public or quasi-public institutions or at the very least tax-exempt by the grace of the people, cannot afford scandal but they can easily afford to set examples of excellence. They are in a unique situation at a point in time when the world would genuinely

Convention on the International Return of Stolen and Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]. The UNIDROIT Convention is a perfect example of this problem. (The author was a member of the United States negotiating team.) Because of the failures of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 214, 1970, 823 U.N.T.S. 231 (1972) ("the UNESCO Convention"), UNESCO turned to UNIDROIT (The International Institute for the Unification of Private Law based in Rome, Italy, comprised of member nations of which the United States is one) and asked for assistance in developing a treaty that would actually "work," i.e. have enough teeth to permit the victim to sue in replevin, worldwide, with some hope of success.

The UNIDROIT Convention is not yet but will soon be in force. It requires six months after the entry of the fifth ratifying instrument. UNIDROIT Convention, art. 12(1). 34 I.L.M. at 1335. To date, it has been signed by 22 nations including Bolivia, Burkina Faso, Cambodia, Cote d'Ivoire, Croatia, Finland, Georgia, Guinea, Hungary, Italy, Lithuania, Netherlands, Pakistan, Paraguay, Peru, Portugal, Romania, Russia, Senegal, Switzerland and Zambia, has been acceded to by China and Ecuador, and has been ratified by Lithuania, Paraguay and Romania which ratified the treaty on January 21, 1998. Thus, the treaty will enter into force on July 22, 1998.

10. See Linda Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. OF INT'L L. 1, 1990. See also *Guggenheim v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

welcome a change in this situation in the art market and the end of the same old debate.¹¹

Although traditionally acquirers, museums in the United States have been increasingly aware of the importance of avoiding the temptations of stolen or smuggled artifacts on the market, however beautiful or important. It is no longer simply a question of not being caught with something that should never have left the old country. It is not simply a question of law, which is only the lowest common denominator of behavior but very expensive for litigants and, therefore, frightening enough. These days, it is a question of ethics and public opinion. The popular press is global and effective, and the reader is interested in a scandal, especially when something expensive and rich people are involved. Because the price of valuable artworks has outpaced the fundraising capacities of most museums, they rely on wealthy donors and patrons or do not buy at all. It is, therefore, now more important and more convenient than ever for museums to take the lead in really doing something about stolen and smuggled art instead of passively hiding behind traditional notions of good title and obsequious deference to benefactors. This article offers a suggestion for museums to be the catalysts of change in the art market.

11. This "same old debate" is about stolen versus merely illegally exported which imposes no cloud on title. See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 287 (1982) concerning whether the art market should bear the burden of clearing out the stolen and smuggled objects or whether the art—rich nations should bear the burden of doing a better job of policing their cultural past. See generally John Henry Merryman, *The Retention of Cultural Property*, *supra* note 4.

DISCUSSION

What American museums¹² have done so far about acquisition policies concerning stolen and illegally exported objects¹³ can be divided into a few broad categories. First, there are the policies of the umbrella institutions,¹⁴ model rules of a sort. Second, there are the aggressive acquisition policies of a few museums—usually museums with something in their history that caused them to adopt the policy—meant to require the old-fashioned if somewhat reckless curator to exercise the requisite diligence before buying an object in a category likely to cause problems later. Third, there are many aged acquisition policies that say very little about the subject other than something general about the museum obtaining good title. There are also the policies practiced by many but written only by one or two to the effect that the museum can take the risk of buying if the object has been published¹⁵ and the plaintiff has not yet spoken. And finally, there are the museums which say, simply and sometimes only in private, that they do not buy antiquities and so they have no need of any such policies. This assortment, of which much

12. This article concerns, mainly, museums in the United States where museums are comparatively young. Outside the United States, the collecting histories and current practices of museums are very different from those in this country. Most countries' museums house objects from their own countries or cultural pasts, or tend to be large treasure houses filled with the spoils of wars of the distant past. (Consider, for example, the British Museum in London and the Louvre in Paris.) Museums elsewhere in the world do not engage in the avid collecting that American museums have done in recent generations. In addition, outside the United States, the concept of private museums is rare by comparison to the state-owned museum. National museums collecting objects from that country's own past tend, these days, to acquire objects when citizen collectors die or when important archaeological discoveries are made, not by purchase. (Consider, for example, the settlement between France and the estate of Picasso which enabled the nation to own a significant number of the works of the artist left in his estate.) The author surveyed many museum acquisition policies but names very few in this article rather than embarrass well-meaning institutions.

13. The term "acquisition policies" as used in this article begs many questions which are discussed throughout the article. What is an "acquisition" and to what issues does an acquisition policy address itself? Some museums write acquisition policies as step-by-step procedures to be followed in-house, without regard for the ethical or legal issues presented by the acquisition.

14. These are organizations to which art museums belong.

15. An object can be published in many ways, but most common is listing with discussion in a scholarly publication, for example a catalogue of the works of a particular artist or inclusion in an exhibition catalogue. If the publication does not include a photograph, query whether the public is on any sort of notice as to the location of the object. Because publication serves the legal purpose of putting the public, or some part of it, on some type of notice of the whereabouts of the object, many unanswered questions arise about how widely a particular publication is read, the nature of its publisher, whether it is merely a scholarly publication intended for libraries, etc.

more is written below, is unfortunate to say the least. Museums can do better.

Turning to each of these categories of acquisition policy one at a time, first we come to the policies of the umbrella institution in the United States. The American Association of Museums ("AAM"), which concerns itself with museums of all sorts in the United States, not only art museums, has something to say to all of its members and all of the museums it accredits about acquiring stolen or smuggled goods.

The Code of Ethics for Museums, published by the American Association of Museums, states as follows:

The distinctive character of museum ethics derives from the ownership, care, and use of objects, specimens and living collections representing the world's natural and cultural common wealth. This stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.

Thus, the museum ensures that:

- collections in its custody support its mission and public trust responsibilities

....

- acquisition, disposal, and loan activities are conducted in a manner that respects the protection and preservation of natural and cultural resources and discourages illicit trade in such materials¹⁶

Many museums follow the recommendation of the AAM or refer in their acquisitions policies to adherence to these rules and the UNESCO Convention of 1970.

Second is the category of aggressive policies adopted by a few museums. These policies stand out in their determination to flush out claims and quiet any dispute before the purchase rather than wait for a claim to surprise them later. The first and most well known of these policies is the former Antiquities Acquisition Policy of The J. Paul Getty Museum which the board of trustees of The J.

16. AMERICAN ASS'N OF MUSEUMS, CODE OF ETHICS FOR MUSEUMS 8 (1994). This code of ethics was adopted by the Board of Directors of the American Association of Museums on November 12, 1993. It recommends that each member museum adopt its own code of ethics, borrowing from and adapting the model code to its own needs but keeping the museum's policy in conformance with the model code. See *id.* at 11 ("Promulgation").

Paul Getty Trust adopted in November, 1987.¹⁷ The Getty 1987 policy was exceptionally clear and specific about the steps which the Museum would take before deciding to purchase an antiquity. The Museum would deal only with a "vendor of substance;" would write and send photographs to the government officials in all countries of likely origin of the piece asking for information about the object; would write and send photographs to IFAR¹⁸ to determine whether the object had been reported as stolen; would collect from the seller the appropriate suite of warranties including a warranty of title and a warranty that the piece had been or would be exported legally from its country of origin and a warrant that the piece had been or would be imported legally into the United States; would promptly announce the acquisition and exhibit the piece; and would return objects which were the subjects of valid claims, taking the statute of limitations and payment of compensation into consideration. Not only did this policy direct the Museum to take steps to protect itself legally, but more importantly, it forced art dealers around the world to make and stand behind promises.

The Metropolitan Museum of Art followed suit with its required warranty and indemnification to be executed by the seller of a work of art to the Museum. Not in the form of a policy, the warranty and indemnification form is to be attached to the bill of sale. It requires the seller to warrant the authenticity and title of the object, and that the export from any country and import into the United States are in conformity with applicable law.

The third category of policy mentioned above is the general written statement, adopted by the board of trustees of the institution,¹⁹ which says simply that the museum must obtain good title to the objects it buys. This is the most common approach to an acquisitions policy among larger American art museums. The Art Institute of Chicago, for example, adopted such a policy in 1986. On the subject of title and related matters, the policy includes only the

17. See Pinkerton, *supra* note 11, at 26 for the full text of the policy. Note that The J. Paul Getty Museum has no comparable acquisitions policy for any other type of artwork, only for classical antiquities.

18. IFAR is the International Foundation for Art Research. In fact, inquiries about stolen art are made to The Art Loss Register, a separate organization which was until recently housed with IFAR in New York City. For a fee, the Art Loss Register will search its computer databases to determine whether the description of the object submitted by the potential buyer matches the description of any object reported as stolen.

19. Most acquisition policies usually are adopted in this manner. As major policies of the institution, they are the responsibility of the full board of trustees or directors.

following language at the very end: that the procedures outlined therein "assume that the Curator has obtained all of the necessary documentation to support the authenticity of the object, that we will obtain good title to the object, etc."²⁰

Fourth is the category of policies that rely on notice in the form of publication and exhibition to bar claims. In November, 1995, The J. Paul Getty Trust revised the Acquisitions Policy for Classical Antiquities to eliminate the requirements for notifying the governments of the countries from which the object likely originated. This revised policy states "Proposed acquisitions must come from established, well-documented (i.e., published) collections. Publication must precede the date of adoption of these revisions, November, 1995. The only category of material that may be excluded from this requirement are fragments of ancient vases that join vases in the Museum's collection." As another part of this simplification of the antiquities acquisition policy, the Getty eliminated its requirement that the seller furnish a full complement of warranties. Shortly after making these revisions in the policy, the Getty Museum acquired Lawrence Fleischman's collection of approximately 300 ancient Greek, Roman and Etruscan artifacts.²¹

The theory behind this type of policy, which many curators practice every day rather than ask pointed questions about the provenance of an object leading to useful answers, is the statute of limitations.²² If the object can be shown to the court as having been known to the world to be in the possession of a known person or institution for a long enough period of time, then the plaintiff, if any, will be barred in theory from recovery in an action to replevy the piece. The museum reasons that it is safe to buy the object whether or not it was once stolen or smuggled.²³

20. One can only guess at the meaning of "etc." in this context.

21. See, e.g., Carol Vogel, *Getty to Add a Collection of Ancient Treasures*, N.Y. TIMES, June 13, 1996, at C17. See also Anna S. Cocks, *The Getty Museum Retreats from the Antiquities Market*, THE ART NEWSPAPER, Dec. 1995, at 1; Jason S. Kaufman, *Getty Sticks with Antiquities*, ART NEWSPAPER, July-Aug., 1996, at 1.

22. There are many different statutes of limitations depending upon the jurisdictions involved in the transaction and the subsequent litigation if any. See, e.g., John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122 (1980).

23. The best example of a case involving this issue is the current litigation by the Goodman family against a Chicago art collector and the Art Institute of Chicago trustee Daniel Searle to recover a family painting by Degas confiscated by the Nazis during World War II. See, *Goodman v. Searle*, 96C-6459 (N.D. iii. filed Oct. 3, 1996). The painting was published, beginning in the 1960's, in the United States in scholarly literature about Degas and small museum catalogues. See *id.* It was exhibited in small museums in the United States, also. See *id.* The plaintiff family worked diligently to recover the piece starting immediately after the end of

The practice of notifying foreign governments and the Art Loss Register of the proposed acquisition, which the Getty Museum used so effectively for several years, is a cumbersome one in every respect.²⁴ More to the point, foreign governments easily embarrassed by the loss of important artwork, even if the export was entirely legal, eventually rebel against these inquiries and either ignore them or send a confusing reply, defeating the informational and the tactical purposes of the inquiry.²⁵

The final category includes the many museums which fail to adopt acquisition policies at all on the grounds that they do not collect antiquities or other "problem" types of artworks. This thinking, of course, is dangerous as one can see by looking at many of the replevin cases in recent years involving objects of relatively modern manufacture.²⁶ Furthermore, some museums without policies may rely on the warranty of title provided by the Uniform Commercial Code,²⁷ wrongly thinking that any problem which grows out of a flawed purchase can be corrected easily by simply returning the object.²⁸

World War II. *See id.* When, in 1965, the younger generation of Goodmans finally found the painting mentioned in an American publication which identified Searle as the current owner, they demanded its return. Searle refused and a lawsuit has ensued. *See id.* Searle's theory is that he was a diligent buyer and that the suit is barred by the statute of limitations in a discovery rule jurisdiction because the painting had been published and exhibited. *See, Goodman v. Searle*, 96C-6459 (N.D. iii. filed Oct. 3, 1996). The Art Institute of Chicago staff participated in the purchase by Searle, helping him with his decision. *See id.*

24. The procedure required by the policy involved sending photographs and measurements to the ministries of culture of the countries of likely origin, waiting for and dealing with responses, sending the same information to The Art Loss Register and awaiting its response, etc. Identifying the countries of likely origin alone is a complex and imperfect process.

25. Shortly after adopting its original Antiquities Acquisition Policy, The J. Paul Getty Museum purchased the now famous marble statue of Aphrodite. Immediately, the Italian press, and even some of the English press, began a blistering campaign against the Museum, claiming that the piece must have been smuggled out of Italy and stolen from the Italian nation. In fact, the Museum had written to the Italian Ministero per i Beni Culturali and asked, well in advance of the purchase, whether the Italian government had any claim to the statue or any information about it. The Ministero replied that they knew nothing about the statue and that they thought it was not Italian. As far as this author knows, the Italian government never again answered directly a letter of inquiry about a proposed acquisition.

26. *See, e.g., Goodman v. Searle*, No. 96C-6459 (N.D. iii. filed Oct. 3, 1996) (trial scheduled for May 5, 1998); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426 (N.Y. 1991).

27. *See U.C.C. § 2-403; DeWeerth v. Baldinger*, 658 F. Supp. 688 (S.D.N.Y. 1987), *rev'd on other grounds*, 836 F.2d 103 (2d Cir. 1987).

28. Returning the object to the dealer for a refund may require a lawsuit, which is public and expensive. In addition, the dealer may have numerous defenses available to him or her which prevent the museum from unwinding the

Thus far, this article has been silent on the meaning of the word "acquisition" as it applies to the policies under review. The uninitiated might assume this means "purchase," when in fact museums acquire artworks by several well-known means. They do sometimes buy outright, but often they persuade patrons to buy and give objects to them, or simply to give them a gift of something the museum wants from the person's collection. Sometimes museums receive bequests under the wills of individuals. Occasionally a museum co-purchases an object with a person or another institution. In addition, there are all the different sorts of lending arrangements between museums and their patrons of exhibitors.

Should a museum's policy against acquiring a problem object extend to all the different means by which an object comes under its roof? The answer, if the museum wants to make a difference in the nature of the art market, is certainly yes. But few, if any, museums concern themselves with the provenance or the possibility of smuggling of an object that they are merely borrowing temporarily for an exhibition. Nor do many ask whether the object about to be donated has a proper provenance and export papers. The fear of stepping out of line among the others, or the fear of looking the gift horse in the mouth, prevents a museum curator from taking precautions in one transaction which may cost him others.²⁹

Generally, museums writing acquisition policies do address the quality of title. Because in the United States, assuming that the law governing the acquisition is American law, we follow the *nemo dat*

transaction. The dealer may not be available to sue or to unwind the transaction, or may have spent the money and be unable to reimburse the museum. It is often the case that a dealer is a mere agent, disclosed or undisclosed, for the real owner who is anonymous.

29. The recent case of the Leopold Foundation's works by Egon Schiele borrowed for exhibition by the Museum of Modern Art in New York City is an example of two problems for museums, the first being the increasingly intense efforts to return Nazi loot stolen from Jewish families during the 1930's and 1940's. Second, the fact that the objects were borrowed—not purchased—may have eliminated or reduced the Museum's concern about the condition of the title. The legal and public relations problems that ensued when two families saw the objects on view at the Museum of Modern Art and claimed them, however, were unfortunate for the Museum. See, e.g., Judith H. Dobrzynski, *Ronald Lauder: Man in the Middle of the Schiele Case*, N.Y. TIMES, Jan. 29, 1998.

The particular problem of artworks looted by the Nazis in the World War II era is a large one commanding more and more attention. The problem is suddenly perceived as large enough that a recent and unusual Congressional hearing on the role of American museums in solving it took place in mid-February, 1998. See Judith H. Dobrzynski, *Questions Over Looted Art Come to Capitol Hill*, N.Y. TIMES, Feb. 15, 1998. The matter of Nazi loot, however, is not the only aspect of museum acquisitions which involve stolen and smuggled objects and therefore not a wide enough area of concern to solve the real problem.

rule (which means that a thief cannot convey good title),³⁰ a museum is concerned about obtaining good title to any artwork it buys so that it does not have to return the goods to the rightful owner. In the United States, we continue to adhere to the Act of State Doctrine³¹ whereby our courts respect and will not upset the acts of another nation performed within its own territory. Therefore, our courts do not order the return of objects merely because they were illegally exported.³² In other words, we do not in practice regard illegal export from any country as a cloud on title. Accordingly, we rarely expect a museum or any other diligent buyer to inquire about export permits or the lack thereof.³³

SUGGESTION

Now the real question: what can museums do to clean up the art market?³⁴ For purposes of this discussion, what acquisitions policies should they have and use to set the example and fix the problem? I suggest a two-part approach. First, all art museums in the United States should refuse to purchase, borrow or accept as a gift any object whatsoever, however insignificant, for which the seller does not deliver a written provenance going back at least one trans-

30. *Nemo dat quod non habet*. A thief cannot convey good title. This is the common law rule. See *In re Binford*, 3 Va. Cas. 390 (E.D. Va. 1878) (stating that "[t]he thief who has stolen property cannot, by sale or delivery, convey it to a person who buys it from him and pays him full value.") Note that in the civil law system where the *nemo dat quod non habet* rule does not apply, only the peculiarities of individual code sections prevent the possessor from acquiring title, by whatever means.

31. See Mark W. Janis, *An Introduction to International Law*, 359-66 (1993) (requiring courts to accept legitimacy of foreign state's acts performed within its own territory); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*, 493 U.S. 400, 404-06 (1990).

32. See *Jeanneret v. Vichy*, 693 F.2d 259 (2d Cir. 1982) (refusing to decide whether illegal export was cloud on title). See also *Government of Peru v. Johnson*, 720 F. Supp. 810 (C.D. Cal. 1989), *aff'd sub nom.*, *Government of Peru v. Wendt*, No. 90-55521, 1991 WL 80599 (9th Cir. May 15, 1991) (unpublished table decision).

33. This article is not about the UNIDROIT Convention. Note, however, that if adopted, that Convention would radically change the law of the United States and would indeed cause illegal export to cloud title.

34. Collectively and individually, museums have attempted to limit the amount of stolen and smuggled art circulating in the market. Their staffs pay attention to IFAR's regular reports of stolen art. Another example is that, since 1993, the Getty Trust has been encouraging museums around the world to use a uniform system of documenting their collections so that losses can be reported easily and understood universally. See Ralph Blumenthal, *Museums Come together to Track Stolen Art*, N.Y. TIMES, July 16, 1996, at C13. This, of course, assumes the unlikely circumstance in which the museum staff is aware enough of its holdings at all times to communicate a theft faster than the thief can move. Neither of these efforts is likely to deter or dampen the market for stolen or smuggled goods.

action and written warranties of title, authenticity and that the object has crossed all international borders legally, with accompanying indemnities, all lasting for twenty years. The warranties and indemnities should expressly permit unwinding the transaction as an alternative to suing for money damages.³⁵ One signed form would do the job. Second, every purchase, gift and in-bound loan by an art museum should go first to the Art Loss Register to assure that the object is not listed there as stolen.

If every art museum were to insist on these documents from every seller, lender and donor, it would be impossible for the art market to continue to operate without these documents because so many artworks are in the trade with the expectation or at least the hope that they will end up in the hands of a museum. Failing to deliver the required paper would take the object out of that all important part of the market, the most important part, where an object is specially honored and specially priced because of its value to a museum. Anyone signing these documents would know that he or she would be liable for the cost to the museum of any inaccuracies in them, and therefore would certainly think at least twice before executing them. Museums should not think of an object as having "museum quality" if its provenance is so weak that the seller won't stand behind it. The rest of the world would come to think of artworks not having this paper accompaniment as being somewhat damaged goods, and appropriately so.

The screams and cries of "Impossible!" and "Ridiculous!" are audible even from here. Donors would say they have no idea where the person from whom they bought the thing got it. Response: Tell the museum whatever you do know about where it came from or do not give it to the museum and forego your tax deduction. Dealers would say they have no idea who sold the thing to their seller and they have no way of finding out. Response: Tell the museum whatever you do know about where it came from or do not sell it to the museum. It can use its acquisitions budget to buy ob-

35. Quietly returning an object which turns out to have a flawed title would eliminate the public spectacle and the cost of litigation. The parties involved should avoid any struggle about the time value of money, or rise or fall in the value of the object over the period of time in question, or about slandered title or loss of reputation. The coincidental damages to either party should be no part of the remedy in a case of this sort: the goal should be simply ridding the museum of the problem object and returning the purchase price, if any. This type of remedy should be especially appealing where the object is donated or loaned to the museum. This aspect of the author's suggestion does, however, beg the question of returning an object to unwind a transaction when law enforcement authorities seize or threaten to seize the object. Title, and where possible possession, should be restored to the seller or donor or lender.

jects that do have the necessary documents. And next time, ask more questions when you buy a piece or beware of the consequences under the Uniform Commercial Code.³⁶

Museums would say they will have to forego all sorts of important objects and turn away gifts from important patrons. Response: If the seller or the donor won't stand behind the title and the legal export or go to some trouble about the history of the piece, then there is likely to be a problem to worry about which will cost the museum more than the object is worth. No other museum will take it, either, for the same reason. The auction houses would have very little to say because they already collect the warranty of title from the consignor.³⁷ They could easily extend the warranty to that of legal export and import³⁸ and ask for the written provenance as well.

The companion step that art museums in the United States should take is to appeal en masse to UNESCO asking — in exchange for instituting the first step — for a letter from the ministry of culture of every signatory to the UNESCO Convention and of the UNIDROIT Convention promising that those countries will not institute litigation in the United States against any participating museum under any law whatsoever to recover artworks which the claimant country cannot identify precisely by description and location as having been in that country within twenty years prior to the lawsuit.

Does the first step have value even if UNESCO refuses to cooperate, or cannot cooperate? Certainly. Neither the art museums nor the treaty signatories would actually be bound legally to do what they have promised to do. But even without cooperation from the treaty countries, museums by taking the first step would bestow enormous benefit on the entire art market, and thereby on themselves.

CONCLUSION

The mere existence of the UNESCO and UNIDROIT conventions evidences the severity of the issues surrounding stolen and illegally exported art. The preceding discussion suggests that muse-

36. See U.C.C. §§ 2-403, 2-312(3) (1995); *Porter v. Wertz*, 68 A.D.2d 141, 416 N.Y.S.2d 254 (1979), *aff'd*, 421 N.E.2d 500 (N.Y. 1981). See also Pinkerton, *supra* note 11, at 17-18 & nn. 94-95.

37. Only in rare circumstances do auction houses sell property to which they, as opposed to a consignor, hold title.

38. Christie's, at least, did require this warranty from its consignors as recently as 1996.

ums, in particular American museums, should take an active role in cleansing the art market. As a result, when the day comes that the United States Senate is asked to ratify the UNIDROIT Convention, as it inevitably will despite the many inadequacies of that treaty,³⁹ if UNESCO and the signatories to these two treaties have evidenced their refusal or reluctance to cooperate with America's museums in trying to clean up the art market, the United States will quite appropriately have difficulty in seeing the point or benefit of the UNIDROIT Convention. As institutions of public learning, museums have this duty.

39. See, e.g., Brian Bengs, Note, *Dead on Arrival? A Comparison of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503 (1996) (noting that lack of due diligence requirement in searching for stolen art is to detriment of good faith purchasers and significant changes that would be required in United States law).